

Rangkaian Hotel Seri Malaysia Sdn Bhd v Husni bin Hussain

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HIGH COURT (ALOR SETAR) — CIVIL SUIT NO 22–88 OF 2006
ZAINAL ADZAM J
21 MARCH 2007

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Contract — Consideration — Past consideration — Whether the contract was void due to past consideration

C

Civil Procedure — Injunction — Mandatory Injunction — Whether there were special circumstances to warrant an injunction

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The plaintiff was the owner of a franchise business in hotels under the name ‘Seri Malaysia’. The defendant entered into two contracts (the Franchise Agreement and the Premises Management Agreement) with the plaintiff to be a franchise holder for ‘Hotel Sri Malaysia’ at Kulim. The defendant, inter alia, had to pay a franchise fee of RM106,500 to the plaintiff on the date of commencement and an advertisement and promotional fund of RM55,000. On 28 February 2005, the plaintiff sent the defendant a letter informing him that he was in arrears for RM221,969.42 (with interest payable on the sum) and reminded the defendant that the plaintiff could terminate if the defendant did not pay. The defendant admitted to the sums but requested the amount to be paid over 18 instalments. The plaintiff refused but was willing to receive 10 monthly instalments. Subsequently, the defendant appealed and sent 18 post dated cheques. The plaintiff again disagreed and returned eight of the cheques requesting the defendant for the rest of the sum. For the next few months the defendant complied but without settling the current arrears. The plaintiff then on 20 July 2005 sent a letter of demand to the defendant stating the amount of arrears with the statement of accounts. The defendant admitted to this but requested the arrears to be rescheduled to 36 months instalments. The plaintiff did not agree to this and sent a notice of termination with effect from 6 February 2006. The defendants disputed owing such an amount and stated that the plaintiff had no right to terminate and raised (i) the issue of past consideration as the agreement was executed on 14 January 2004 but the commencement date was 1 April 2004 and challenged the agreement’s validity, and (ii) raised a number of failures of the plaintiff to honour the agreements, inter alia, failing to provide adequate training and equipment and failure to promote. The plaintiff claimed for a mandatory injunction, to which the defendant argued that there were no special circumstances to warrant one.

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Held, allowing the plaintiff’s prayers (except prayer 2) with costs:

- (1) When the defendant and the plaintiff executed the Franchise Agreement all the terms and conditions as embodied in the agreement in law became executed

- A consideration as they formed an integral and co-related part of the agreement and therefore were valid and enforceable and not past consideration. A proper reading of the Franchise Agreement showed that past consideration was a non-issue. All the necessary payments to be paid by the defendant were due and payable beginning from the 'Date of Commencement' or 'Operational Date' respectively. There was therefore no requirement for the defendant to provide any consideration prior to those dates (see paras 9, 10);
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- (2) To grant a mandatory injunction in an interlocutory application there must have been a high degree of assurance that, should the matters go to trial it would appear that the injunctions were rightly granted. The plaintiff's case was supported by contemporary documents in the form of correspondence between the parties including the defendant's post dated cheques pertaining to the arrears. The defendant through its letters explicitly admitted to be indebted to the plaintiff pursuant to the Agreements. The defendant did not dispute the various amounts claimed, nor was it stated in those letters that since the plaintiff had failed to perform their obligations under the Agreements, the defendant was not bound to reciprocate by making the necessary payments. The defendant did not refer to the paragraphs of the plaintiff's affidavit relating to all the aforementioned letters both from the plaintiff and himself. As those allegations were not challenged by the defendant, they were treated as an admission by the defendant (see paras 11, 13, 14), *Carabao Exports Pty Ltd v Online Management Consultants Sdn Bhd* [1988] 3 MLJ 271 distinguished;
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- (3) About the submission that the plaintiff had failed in their obligations, the defendant's letter was explanatory rather than attributing blame to the plaintiff. Even the defendant's solicitors' letter which disputed the plaintiff's claim for the first time did not mention anything remotely related to any breach of obligation. The claim on these grounds seemed to be nothing more than an afterthought (see paras 16–20);
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- (4) The submission that there were no special circumstances in the plaintiff's case for the court to consider granting the mandatory injunction had no merit. The plaintiff was entitled to terminate the Agreements right from the beginning. The defendant breached the primary condition (cl 7.3.2) but the plaintiff had allowed the defendant's request to pay the arrears by instalments. The plaintiff had established that there were special circumstances in their favour for the granting of the mandatory injunction. The balance of convenience was also very much in favour of the plaintiff (see paras 18, 20).
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H **[Bahasa Malaysia summary]**

- I Plaintiff adalah pemilik perniagaan francais di bawah nama 'Seri Malaysia'. Defendan telah memasuki dua kontrak (Perjanjian Francais dan Perjanjian Pengurusan Premis) dengan plaintiff untuk menjadi pemegang francais bagi 'Hotel Seri Malaysia' di Kulim. Defendan, antara lain, hendaklah membayar bayaran francais sebanyak RM106,500 kepada plaintiff pada tarikh permulaan serta pengiklanan dan dana

promosi sebanyak RM55,000. Pada 28 Februari 2005, plaintif telah menghantar kepada defendan sepucuk surat memaklumkan terdapat tunggakan sebanyak RM221,969.42 (berserta faedah yang kena dibayar untuk jumlah tersebut) dan mengingatkan defendan bahawa plaintif akan menamatkan perjanjian jika defendan tidak membuat sebarang bayaran. Defendan mengakui jumlah yang tertunggak dan meminta jumlah tersebut di bayar dalam 18 bayaran ansuran. Plaintif menolak tetapi bersedia untuk menerima 10 bayaran ansuran. Kemudiannya, defendan telah membuat rayuan dan telah menghantar 18 cek lewat tarikh. Plaintif sekali lagi tidak bersetuju dan telah memulangkan 8 cek sambil meminta defendan menjelaskan baki jumlah yang tertunggak. Untuk beberapa bulan defendan telah mematuhi tetapi masih tidak menjelaskan tunggakan terkini. Plaintif kemudian pada 20 Julai 2005 menghantar surat tuntutan kepada defendan menyatakan jumlah tertunggak berserta penyata-penyata akaun. Defendan mengakuinya tetapi membuat permintaan jumlah tertunggak dijadualkan semula kepada 36 bulan bayaran ansuran. Plaintif tidak bersetuju kepada cadangan Defendan dan telah menghantar notis penamatan berkuatkuasa dari 6 Februari 2006. Defendan mempertikaikan berhutang jumlah tersebut dan menyatakan bahawa plaintif tidak berhak untuk sebarang penamatan dan membangkitkan (i) isu balasan lampau memandangkan perjanjian yang telah disempurnakan pada 14 Januari 2004 tetapi tarikh permulaannya pada 1 April 2004 dan telah mencabar kesahan perjanjian, dan (ii) membangkitkan beberapa kegagalan plaintif untuk mematuhi perjanjian-perjanjian, antara lain, kegagalan untuk menyediakan latihan yang mencukupi dan peralatan dan kegagalan dalam promosi. Plaintif menuntut untuk injuksi mandatori, yang mana defendan berhujah bahawa tiada keadaan khas bagi membolehkannya.

Diputuskan, membenarkan permohonan plaintif (kecuali permohonan 2) dengan kos:

- (1) Apabila defendan dan plaintif melaksanakan Perjanjian Francais, keseluruhan terma-terma dan syarat-syarat sebagaimana termaktub dalam perjanjian, dari segi undang-undang menjadikan ianya balasan perlaksanaan memandangkan ia membentuk kelengkapan dan bersangkut paut dengan bahagian-bahagian perjanjian dan dengan itu menjadi sah dan boleh dikuatkuasakan dan bukannya balasan lampau. Pembacaan secara teliti Perjanjian Francais menunjukkan bahawa balasan lampau adalah bukan isu. Keseluruhan bayaran yang diperlukan untuk dibayar oleh defendan adalah tertunggak dan mesti dibayar masing-masing bermula dari 'Tarikh Permulaan' ataupun "Tarikh Operasi". Oleh itu, tidak terdapat keperluan bagi defendan untuk menyediakan apa-apa balasan sebelum daripada tarikh-tarikh tersebut. (lihat perenggan 9, 10);
- (2) Membenarkan injuksi mandatori dalam permohonan interlokutori mesti diikuti dengan tahap keyakinan yang tinggi bahawa sekiranya perkara ini dibicarakan, ini akan menunjukkan bahawa injuksi telah diberikan secara betul. Kes plaintif telah disokong oleh dokumen-dokumen kontemporari dalam bentuk surat-menyurat antara pihak-pihak termasuklah cek lewat tarikh

- A defendan berhubung dengan tunggakan tersebut. Defendan melalui suratnya secara berterus terang mengakui terhutang kepada plaintif berdasarkan kepada Perjanjian-Perjanjian. Defendan tidak pernah mempertikaikan jumlah yang dituntut, ataupun menyatakan di dalam surat-surat tersebut bahawa memandangkan plaintif telah gagal menunaikan tanggungjawab di bawah perjanjian-perjanjian, defendan tidak terikat untuk membalas dengan membuat bayaran-bayaran yang diperlukan. Defendan tidak merujuk kepada perenggan dalam affidavit plaintif berkenaan dengan apa yang disebutkan dalam surat daripada plaintif dan juga pihaknya. Memandangkan pengatahan-pengatahan tersebut tidak dicabar oleh defendan, kesemuanya akan dianggap sebagai pengakuan oleh defendan.(lihat perenggan 11, 13 dan 14),
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- C *Carabao Exports Pty Ltd v Online Management Consultants Sdn Bhd* [1988] 3 MLJ 271 dibezakan;
- (3) Berkenaan dengan hujahan bahawa plaintif telah gagal dalam tanggungjawabnya, surat defendan adalah suatu bentuk penjelasan dan bukannya menyalahkan kepada plaintif. Walaupun surat peguam defendan yang mempertikaikan tuntutan plaintif untuk pertama kalinya tidak sedikit pun menyebut apa-apa berkenaan kemungkiran kewajipan. Tuntutan ke atas alasan-alasan ini nampaknya tidak lain dan tidak bukan adalah sesuatu yang difikirkan kemudian. (lihat perenggan 16–20);
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- (4) Hujahan bahawa tidak terdapat suatu keadaan khas dalam kes plaintif bagi mahkamah mempertimbangkan injunksi madatori adalah tidak bermerit. Plaintif adalah berhak untuk menamatkan perjanjian-perjanjian dari mula lagi. Defendan telah memungkirinya syarat utama (kl. 7.3.2) tetapi plaintif telah membenarkan permintaan defendan untuk membayar tunggakan melalui bayaran ansuran. Plaintif telah membuktikan bahawa terdapat keadaan khas dipihaknya untuk memberikan injunksi mandatori. Imbangan kesenangan juga nampaknya berada di pihak Plaintif.(lihat perenggan 18,20)]
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Notes

For cases on past consideration, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2689–2695.

- G For cases on mandatory injunction, see 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 3064–3079.

Cases referred to

- American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504 (refd) (refd)
- H *Carabao Exports Pty Ltd v Online Management Consultants Sdn Bhd* [1988] 3 MLJ 271 (refd)
- Gibb & Co v Malaysia Building Society Bhd* [1982] 1 MLJ 271 (refd)
- Luen Heng & Co v Oakes* [1966] 1 MLJ 14 (refd)
- Malayan Banking Bhd v Chong Hin Trading Co Sdn Bhd & Ors* [2001] 6 MLJ 223 (refd)
- I *MBF Holdings Bhd v East Asiatic Co (M) Bhd* [1995] 3 MLJ 49 (refd)

Ng Hee Thoong v Public Bank Bhd [2000] 2 MLJ 29 (refd)

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Shepherd Homes Ltd v Sandham [1970] 3 All ER 402 (refd)

South East Asia Insurance Bhd v Nasir Ibrahim [1992] 2 MLJ 355 (refd)

Tinta Press Sdn Bhd v Bank Islam (M) Bhd [1987] 2 MLJ 192 (refd)

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Legislation referred to

Contract Act 1950 s 80

Rules of the Supreme Court 1957 O 14

Abdul Shukor Ahmad (Shukor Baljit & Partners) for the plaintiff.

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Chuah Thiong Gee (Fadzil, Chua & Song) for the defendant.

Zainal AdzamJ:

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[1] The plaintiff is the exclusive owner of a franchise business in hotels under the name 'Seri Malaysia'. On 14 January 2004, the defendant entered into two agreements with the plaintiff essentially for him to be a franchise holder for 'Hotel Seri Malaysia' at Kulim. The two agreements were the Franchise Agreement and the Premises Management Agreement ('the two agreements'). The plaintiff's case basically was that the defendant had failed to adhere to the payment obligations under the two agreements. The plaintiff filed a writ of summons and by a summons in chambers prayed for an injunction against the defendant from continuing to manage and operate the said hotel. Apart from that, the plaintiff also prayed for various related orders to preserve the plaintiff's interest and for the defendant to do all that was necessary for the handing over of the hotel back to the plaintiff. The plaintiff's prayer for a declaration (prayer 2) that the plaintiff has a right to take over the hotel from the defendant was withdrawn during submissions.

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[2] The chronology of the plaintiff's case, as stated in its affidavits in support, briefly are as follows:

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Date

Letters/Events

14 January 2004

The Franchise Agreement and the Premises Management Agreement executed by the plaintiff and the defendant. In both the Agreements the 'Date of Commencement' was '1 April 2004'. Under Schedule III of the Franchise Agreement the defendant

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- A** was to pay to the plaintiff on the Date of Commencement a Franchise Fee of RM106,500 and an Advertisement and Promotional fund of RM5,5000; both not later than the 'Date of Commencement' (ie, 1 April 2004).
- B** The Defendant was also required to pay monthly a Royalty of 5% from the Operational Income and 2% from the same towards the Advertisement and Promotional Fund; both not later than the 14th of each month
- C** beginning from the 'Operational Date' (ie. 1 May 2004). Apart from that, the defendant was also required to pay one month rent in advance, various Deposits and Monthly fees under Schedule II of the Premises Management Agreement; beginning from the 'date of Commencement' or 'Operational Date' respectively.
- D**
- 28 February 2005
- E** The Plaintiff sent a letter to the Defendant informing him that he was in arrears with his payments under the two agreements for the amount of RM221,960.42. The Plaintiff also drew the Defendant's attention to clauses 9.3 of the Franchise Agreement and 11.2 of the Premises Management Agreement that interest of 10% per annum was payable on the arrears sum. Apart from that, the Plaintiff stated that under clause 7 of the Franchise Agreement, the Plaintiff can terminate both the Agreements for the non-payment.
- F**
- G** 15 April 2005
- The Defendant replied admitting the arrears due but however requested the amount due to be paid by 18 monthly instalments of RM15,361.32.
- H** 4 May 2005
- The plaintiff replied disagreeing to the 18 monthly instalment but offered instead 10 monthly instalments of RM27,650.00 each with the final instalment of RM27,653.91. The Defendant was required to start payment from 10 May 2005 inclusive of the current amount due at RM30,968.06.
- I**

6 May 2005	The defendant again appealed to the plaintiff for payment to be by 18 monthly instalments and in fact sent 18 post-dated cheques for the amount of RM15,361.33 each.	A
14 May 2005	The plaintiff replied, again disagreeing to the 18 monthly instalments and insisting on the 10 monthly instalments. The plaintiff returned eight of the defendant's post-dated cheques requesting the defendant to send new cheques for the amount of RM 12,288.67 to cover the current deficit.	B C
24 May 2005	The plaintiff received an undated letter from the defendant sending a cheque for RM 12,288.67. According to the plaintiff, at that point the defendant had only settled the first instalment of the amount in arrears and the current amount due of RM30,968.06 was still unpaid. For the subsequent months the defendant paid by cheques of RM15,361.33 each without settling the current arrears.	D E
20 July 2005	The plaintiff sent another letter of demand to the defendant stating the amount of arrears due from March 2005 to May 2005 to be RM91,045.61. A Statement of Account was also attached to the letter.	F
2 September 2005	The plaintiff's solicitors sent a letter of demand to the defendant for arrears amounting to RM348,738.64 to be paid within 14 days from the receipt of the letter.	G
15 October 2005	The defendant replied to the plaintiff admitting the amount due but however requesting the payment of the arrears to be rescheduled to 36 monthly instalments of RM9,687.19 each.	H
19 October 2005	The plaintiff replied informing the defendant that the Board of Directors rejected the defendant's request.	I
2 February 2006	The plaintiff sent to the defendant a notice of termination of the two agreements with effect from 6 February 2006 at 10.00 am.	

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7 February 2006

As a result of the defendant's appeal, the plaintiff's solicitors sent a notice of termination of the two agreements with effect from 28 February 2006 for non-payment as of 1 February 2006 of arrears of RM449,131.02.
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14 February 2006

The defendant's solicitors replied to the plaintiff's solicitors denying owing the arrears sum of RM449,131.02 and stating that the plaintiff had no right to terminate the two Agreements without an order of the court.
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[3] The defendant in his affidavit-in-reply disputed the plaintiff's application and raised a number of issues. Firstly, the issue of past consideration as the Franchise Agreement was executed on 14 January 2004 but the commencement date was 1 April 2004 (the defendant's affidavit wrongly stated this as '14 January 2005'), ie, two and a half months later. The defendant therefore challenged the validity of the Agreement. The defendant then proceeded to dispute and deny the averments in various paragraphs (but not all paragraphs as will be seen later) of the plaintiff's affidavit and put the plaintiff to strict proof thereof. Finally, the defendant raised a number of failures on the part of the plaintiff to honour its obligations to the defendant under the two agreements, among them was the plaintiff's failure to provide the premises with fire-fighting equipment; failure to give him any proper training; failure to advertise and promote the hotel; failure to give the necessary cooperation; and, failure not to discriminate between the franchise holders. Apart from that the plaintiff's counsel also raised some other issues in the course of his submissions which I shall deal with later.
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[4] The plaintiff's prayers are essentially an application for a mandatory injunction. The law governing the issuance of mandatory injunction is quite settled. In the Supreme Court case of *Tinta Press Sdn Bhd v Bank Islam (M) Bhd* [1987] 2 MLJ 192 at 193–194, Syed Agil SCJ clarified the law as follows:
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... The discretionary power of the Court to grant a mandatory injunction is provided by s 53 of the Specific Relief Act 1950 (Act 137). By judicial process, the power is extended to the granting of an interlocutory mandatory injunction before trial. Such discretion however must be exercised and an injunction granted only in exceptional and extremely rare cases as was held in *Wah Loong (Jelapang) Tin Mine Sdn Bhd v Chia Ngen Yick* [1975] 2 MLJ 109 and confirmed by the Federal Court in *Sivaperuman v Heah Seok Realty Sdn Bhd* [1979] 1 MLJ 150. The case must be unusually strong and clear in that the Court must feel assured that a similar injunction would probably be granted at the trial on the ground that it would be just and equitable that the plaintiff's interest be protected by immediate issue of an injunction, otherwise irreparable injury and inconvenience would result, (see *Gibb & Co v Malaysia Building Society Bhd* [1982] 1 MLJ 271, and *Shepherd Homes Ltd v Sandham* [1971] Ch 340). Where the case is one of urgency, O 29 r 1(2) of the RHC allows an application to be made ex parte.
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[5] Eusoffe Abdoolcader J (as His Lordship was then) in the Federal Court case of *Gibb & Co v Malaysia Building Society Bhd* [1982] 1 MLJ 271 at 273, in delivering the judgment of the court, stated:

... Before we deal with the issues raised we should perhaps touch on a point made by Mr Sri Ram for the appellant in referring to the judgment of this Court in *Sivaperuman v Heah Seok Yeong Realty Sdn Bhd* [1979] 1 MLJ 150 which, referring to a pronouncement to that effect in *Wah Loong (Jelapang) Tin Mine Sdn Bhd v Chia Ngen Yiok* [1975] 2 MLJ 109, restates inter alia that an interim or interlocutory mandatory injunction is never granted before trial save in exceptional and extremely rare cases. That statement of the law is correct as an interlocutory application for a mandatory injunction is a very exceptional form of relief (*Canadian Pacific Railway v Gaud* [1949] 2 KB 239 (at p 249)) but there is no reason why interlocutory or indeed interim mandatory injunctions should not issue in proper and appropriate cases and the Court has jurisdiction to so order. Fry J said in *Bonner v Great Western Railway Company* [1883] 24 Ch D 1, 10 (at p 10): 'I have no doubt of the jurisdiction of the Court to grant a mandatory injunctions as well as the hearing'. The case however must be 'unusually sharp and clear' (*Shepherd v Sandham* [1971] Ch 340), and the Court must feel a high degree of assurance that at the trial a similar injunction would probably be granted but we should observe that questions of degree are involved which depend inter alia upon considerations of hardship to the parties.

[6] His Lordship then further added:

(1) Whole relief granted by interlocutory order.

The short answer to the issue in this respect is that the Court is not precluded from granting an interlocutory injunction where this would virtually give the applicant therefore on his claim the full relief actually sought to be secured at the final hearing when the matter is viewed on a balance of convenience (*Woodford v Smith* [1970] 1 WLR 806, 817, 818 (at pp 817–818); *Wah Loong (Jelapang) Tin Mine Sdn Bhd v Chia Ngen Yiok* [1975] 2 MLJ 109 (at p 114); *Sivaperuman v Heah Seok Realty Sdn Bhd* [1979] 1 MLJ 150. If there is plainly no defence to the action, and the only object in raising a defence is delay, an injunction should issue even if it gives the applicant his whole remedy before the trial (*Manchester Corporation v Connolly* [1970] 1 Ch 420).

[7] It was submitted on behalf of the defendant that, as shown in the defendant's affidavit, the plaintiff had failed to perform its obligations under the two agreements. As such the defendant was not bound to reciprocate by making the necessary payments to the plaintiff. It was also stressed that there were no special circumstances made out by the plaintiff for the court to grant the mandatory injunction sought (as in the case of *MBF Holdings Bhd v East Asiatic Co (M) Bhd* [1995] 3 MLJ 49). The defendant also submitted that the letters sent to the plaintiff by him were with the intention of avoiding litigation and to protect the reputation of the defendant without any intention of abandoning the defendant's right to seek a counter claim against the plaintiff. For this the Defendant relied on the statement in a very brief oral judgment of Abdul Aziz J in the case of *Luen Heng & Co v Oakes* [1966] 1 MLJ 14. That case was an application under O 14 of the Rules of the Supreme Court 1957 where the learned judge stated:

It has been said that 'the summary jurisdiction conferred by this Order (O 14) must be used with care. A defendant ought not to be shut out from defending unless it is very clear indeed

- A that there is no case in the action under discussion. Summary judgment under this rule should not be granted when any serious conflict as to the matter of fact or any real difficulty as to matter of law arises.' ... The whole case rests on the interpretation of that part of the letter offering payment by instalments to 'avoid litigation' sent by Mr Oakes as treasurer of the club. The letter, to my mind, can be interpreted to mean an admission of liability or an independent offer to protect the reputation of the club in respect of misfeasance on the part of the staff on the club.
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[8] Finally, the defendant relied on the Brunei High Court case of *Carabao Exports Pty Ltd v Online Management Consultants Sdn Bhd* [1988] 3 MLJ 271 where the headnote under 'held', inter alia, reads:

- C (1) The court cannot try on this interlocutory application the question of partnership or no partnership and it is impossible for the court to give judgment on the alleged admission based on this ground.
- (2) ...
- D (3) The admission must be a clear admission of all, and not simply evidence of some of the facts upon which the plaintiff relies to establish his cause of action.

[9] Based on the aforesaid, the defendant argued that he had not made any clear admission on the plaintiff's claim and in his letter dated 15 April 2005 the defendant raised two matters where the plaintiff failed in its obligations.

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[10] First, on the issue of past consideration. When the defendant and the plaintiff executed the Franchise Agreement, all the terms and conditions as embodied in the agreement in law became executed consideration as they form an integral and co-related part of the agreement which is therefore valid and enforceable and not past consideration. The difference between executed consideration and past consideration is explained in Anson's Law of Contract (27th Ed) 1988 at p 93 which reads as follows:

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G Executed consideration must be distinguished from past consideration which is a mere sentiment of gratitude or honour prompting a return for benefits received and, in other words, is no consideration at all. In the case of executed consideration, both the promise and the act which constitutes the consideration are integral and co-related parts of the same transaction. In the case of past consideration, however, the promise is subsequent to the act and independent of it; they are not in the substance part of the same transaction. Thus if A saves B from drowning, and B later promises a reward, A's action cannot be relied on as consideration for B's promise for it is past in point of time.

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[11] Apart from that, a proper reading of the Franchise Agreement shows that the argument of past consideration by the defendant is actually a non-issue. All the necessary payments (in fact termed as 'Balasan' in the agreements) to be paid by the defendant as stipulated in clauses 2.2 and 6.5.1 read together with Schedule III of the Agreement were due and payable beginning only from the 'Date of Commencement' or 'Operational Date' respectively. There was therefore no requirement for the defendant to provide any consideration prior to the 'Operational Date' or the 'Date of Commencement' even though the Agreement was executed on 14 January 2004. Such a condition cannot be termed as a past consideration within the meaning of

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illustration (c) of s 80 of the Contracts Act 1950 (*Malayan Banking Bhd v Chong Hin Trading Co Sdn Bhd* [2001] 6 MLJ 223). On this issue the Supreme Court held that the court should not take a strictly chronological view of the terms and conditions in an agreement (*South East Asia Insurance Bhd v Nasir Ibrahim* [1992] 2 MLJ 355).

[12] The next issue is to determine how strong and clear is the plaintiff's case against the defendant. On this issue, it is settled law that the ordinary *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504 principles are not applicable, for to grant a mandatory injunction in an interlocutory application there must be a high degree of assurance that, should the matters go to trial it would appear that the injunctions was rightly granted (*Shepherd Homes Ltd v Sandham* [1971] CH 340, [1970] 3 All ER 402 *Gibb & Co v Malaysian Building Society Bhd*) The plaintiff's case is supported by contemporary documents in the form of correspondence between the plaintiff and the defendant including the defendant's post-dated cheques pertaining to the arrears of payment due from the defendant to the plaintiff. As can be seen from the plaintiff's affidavit, the defendant through no less than four letters (dated 15 April 2005, 6 May 2005, 24 May 2005 and 5 October 2005) explicitly admitted to being indebted to the plaintiff pursuant to the two agreements. In none of those letters did the defendant dispute the various amounts claimed by the plaintiff. Nor was it ever stated in those letters that since the plaintiff had failed to perform their obligations under the two agreements, the defendant was not bound to reciprocate by making the necessary payments

[13] Revealingly, the defendant's letters to the plaintiff invariably carried the caption either 'Rayuan Menyusun Semula Pembayaran Hutang Tertunggak' or just 'Pembayaran Hutang Tertunggak' and each time referred to the preceding letter from the plaintiff and the then current outstanding arrears due. Apart from admitting being in arrears with the plaintiff, the defendant in those letters in fact pleaded to settle the arrears by instalments and even proceeded to send to the plaintiff the post-dated cheques. In the defendant's letter to the plaintiff dated 5 October 2005, the defendant stated, inter alia:

Untuk makluman pihak puan, setelah menerima surat tuntutan hutang tertunggak yang pertama, saya telah berusaha mencari wang yang sebanyak dituntut, tetapi tidak berjaya. Oleh sebab itulah, saya mengirim 'post dated cheque' sebanyak 18 keping untuk membayar hutang tersebut. Tetapi pihak puan tidak bersetuju dan mengirim kembali 8 keping cek melalui surat pihak puan yang bertarikh 14 Mei 2005 (Ruj: RHSM/SF/01/25 Jld.3(94). Pihak puan hanya meluluskan 10 kali pembayaran sahaja iaitu:

Bayaran 1-9: RM27,650

Bayaran 10: RM27,653.91.

Selain dari itu, pihak puan juga menuntut saya membayar bayaran semasa iaitu berjumlah lebih kurang RM30,000 setiap bulan. Berdasar tuntutan di atas, jumlah yang perlu saya bayar tiap-tiap bulan selama 10 bulan adalah lebih kurang RM57,650. Jika ditolak jumlah pada 'post dated cheque' yang diterima oleh pihak puan iaitu RM15,361.33 sebulan, maka jumlah sebenar yang perlu saya tambah dan kirim kepada pihak puan setiap bulan selama 10 bulan berjumlah lebih kurang RM42,288.67.

[14] In his letter dated 15 April 2005 to the plaintiff, the defendant pleaded to settle the arrears amount by 18 monthly instalments. When the plaintiff replied

- A rejecting the proposal and allowing only ten monthly instalments, the defendant still appealed for the 18 monthly instalments through his reply dated 6 May 2005; and in fact sent the 18 post-dated cheques even though the defendant was aware that the plaintiff had rejected the proposal. By his letter dated 5 October 2005 and in response to the plaintiff's solicitor's letter of demand dated 2 September 2005 for the full arrears sum, the defendant persisted in requesting payment of the arrears be rescheduled, this time to 36 months instead. The repeated admission by the defendant in this case is totally different from the circumstances in the case of *Carabao Exports Pty Ltd v Online Management Consultants Sdn Bhd*. Unlike in that case, in the present case, the defendant's admission of indebtedness to the plaintiff was based on letters sent by the defendant himself and not from circumstantial evidence.

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- [15] One thing that is very conspicuous from the defendant's affidavit in reply is that the defendant never referred to, let alone denied the paragraphs of the plaintiff's affidavit relating to all the aforementioned letters both from the plaintiff and himself. While he touched specifically on all the other paragraphs of the plaintiff's affidavit the defendant in his affidavit glaringly avoided referring to the relevant paragraphs of the plaintiff's affidavit which referred to those inculpatory letters. As the plaintiff in its affidavit had made such firm and clear allegations which are supported by contemporary documents, and as those allegations are not challenged or denied by way of an affidavit by the defendant, I am bound in law to treat those unchallenged allegations or assertions as an admission by the defendant. The Court of Appeal in *Ng Hee Thoong v Public Bank Bhd* [1995] 1 AMR 622 stated the principle as follows:

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Now, it is a well settled principle governing the evaluation of affidavit evidence that where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict is usually treated as an admission by him of the fact so asserted: *Alloy Automotive Sdn Bhd v Perusabaan Ironfield Sdn Bhd* [1986] 1 MLJ 382; *Overseas Investment Pte Ltd v O'Brien* [1988] 3 MLJ 332.

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[16] In the defendant's submission, as stated earlier, on the basis of what was said in the case of *Luen Heng & Co v Oakes*, the letters of the defendant were with the intention of avoiding litigation and to protect the defendant's reputation without any intention of abandoning the defendant's right to seek a counter claim against the plaintiff. As stated in the learned judge's very brief oral judgment: 'The whole case rests on the interpretation of that part of the letter offering payment by instalments to avoid litigation'. However as stated earlier, in all the four letters sent by the defendant to the plaintiff, the defendant explicitly admitted owing the arrears as claimed by the plaintiff. At no time did he deny the arrears were due and that was further substantiated when in his affidavit-in-reply he never even referred to or denied his own letters. The defendant for the first time disputed the plaintiff's claim through his solicitor's letter dated 14 February 2006, ie, after the plaintiff had terminated the two agreements by their letter dated 6 February 2006. There was thus nothing in any of the relevant letters to suggest that the defendant's admission of being in arrears was to avoid litigation. What transpired instead was that his procrastination tactics resulted in the plaintiff delaying in pursuing their right in court.

[17] On the defendant's submission relating to the plaintiff's failure in its obligations to him under the two agreements, the only mention of any problem in his letters to the plaintiff remotely referring to it was in the letter dated 15 April 2005. To put the matter into its proper perspective, I reproduce what the defendant stated in that letter:

Sebagai tambahan, saya ingin menyatakan juga di sini perkara yang sudah pun pihak puan ketahui. Seperti yang dimaklumkan kepada pihak puan secara lisan dan surat bahawa pegawai akaun Seri Malaysia Kulim yang dicadangkan oleh pihak RHSM telah tidak menjalankan tugasnya dengan baik dan tidak bertanggungjawab. Saya telah meminta pihak RHSM membantu saya untuk membetulkan akaun yang dikucarkacirkan oleh pegawai akaun tersebut. Dan saya telah mengarahkan pegawai akaun tersebut supaya berhenti.

Sebaik saja beliau diganti dengan pegawai akaun baru beliau telah berusaha untuk menyusun semula akaun-akaun Seri Malaysia Kulim dan beliau telah mula dapat menjelaskan sewa RHSM yang pertama. Walau bagaimanapun saya sedang meneliti akaun-akaun yang dikucarkacirkan oleh pegawai akaun lama itu dan jika terdapat sebarang penyelewengan maka saya akan mengambil tindakan yang sesuai terhadapnya.

Sungguhpun demikian, saya masih tetap bertanggungjawab dan tetap akan menjelaskan segala bayaran yang ditetapkan oleh pihak RHSM kepada saya. Saya hanya memohon dan merayu kepada puan agar cara pembayaran tersebut dapat dijadualkan semula. Di bawah ini saya mencadangkan jadual Penjadualan Semula Cara-cara Pembayaran.

Di bawah ini saya sertakan jadual pembayaran tersebut untuk pertimbangan dan kelulusan pihak puan.

[18] That letter was explanatory rather than attributing blame to the plaintiff. Even the defendant's solicitors' letter to the plaintiff which disputed the plaintiff's claim for the first time did not mention anything remotely related to any breach of obligation by the plaintiff under the two agreements. So the defendant's claim on these grounds seem to be nothing more than an afterthought. The defendant raised the matter for the first time in his affidavit in reply; and the plaintiff replied to each and every allegation by the defendant on this matter in its second affidavit exhibiting relevant documents and letters to show that it had carried out its obligations diligently. There was again no response from the defendant by way of an affidavit in reply.

[19] The defendant did submit that there are no special circumstances in the plaintiff's case for the court to consider granting the mandatory injunction. In my considered opinion that submission has no merit. The plaintiff was under the terms of the two agreements entitled to terminate the agreements right from the beginning. Clause 7.3.2 provides that failure of the defendant as the franchise holder to make payment prescribed in both the two agreements (deemed as a primary condition) will entitle the plaintiff to immediately terminate both the agreements. Upon the breach of that primary condition by the defendant, the plaintiff was very accommodating by allowing the defendant's request to pay the arrears by instalments. However, the defendant wanted to settle the arrears only at his own terms and nothing less. The plaintiff indulged the defendant and allowed the matter to drag on for exactly one year before deciding to terminate the two agreements. On 28 February 2006 the defendant by his letter dated 5 October 2005 even acknowledged the plaintiff's assistance for his predicament, where he mentioned:

- A Cadangan pembayaran ini dibuat berdasarkan kemampuan pihak kami dan unjuran pendapatan kami. Untuk pengetahuan pihak puan, setelah pihak puan menugaskan GWI untuk membantu kami dari segi pelan pemasaran Hotel Sri Malaysia Kulim, perniagaan kami telah meningkat. Terima kasih di atas keprihatinan dan tindakan segera pihak puan. Berdasarkan pelan pemasaran yang baru itu, insyaallah kami yakin dan percaya kami akan berjaya membuat pembayaran yang seperti dicadangkan.

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- [20] It is noteworthy that attached to the plaintiff's letter dated 20 July 2005 was a statement of account showing the financial performance of the defendant's hotel. The nett total revenue for the hotel for the period between May to December 2004 was RM1,138,363.21 and for the period between January to June 2005 was RM788,526.51. Again, this letter and the financial statement attached to it was not referred to, let alone denied by the defendant in his affidavit-in-reply or submission. So apparently the defendant's hotel at the material time was not exactly experiencing financial losses. The real problem thus can only be attributed, to put it mildly, to the defendant's managerial and financial incompetence. The defendant should be more than grateful to the plaintiff for the indulgence accorded to him for the plaintiff, as stated earlier, could have taken the easy step by terminating Agreements right from the moment the defendant was initially in arrears of his payments.

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- [21] Based on all the facts available to me, in my opinion the plaintiff has successfully established that there are special circumstances in its favour for the granting of the mandatory injunction. The balance of convenience is also very much in favour of the plaintiff. Despite his clear admission of the arrears due and consequently being in breach of the two agreements, the defendant would not surrender possession of the hotel to the plaintiff. Being in the hospitality business, the reputation and goodwill of the plaintiff is of paramount importance and defects in any particular franchise would have a detrimental effect on it. The defendant has shown that he is incapable of managing the hotel as he ran into financial difficulties with his payments under the two agreements almost immediately after the commencement of the operation and his situation only got worse from then on. Any further indulgence from the plaintiff would have a negative effect on the other franchises in the hotel chain. All of this cannot be compensated in pure monetary terms in the form of damages.

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- [22] The circumstances in this case seems to be similar to the case of *Tinta Press Sdn Bhd v Bank Islam (M) Sdn Bhd*. In the present case the franchise is owned by the plaintiff as provided in the agreements; there was a clear breach of the agreements by the defendant; the circumstances show that an injunction would be granted against the defendant; the balance of convenience is very much in favour of the plaintiff; any delay would cause irreparable damage to the plaintiff; and the plaintiff had been helpful and accommodating to the defendant by not taking the easy way of terminating the agreements from the beginning. Due to all of the aforesaid reasons, I am more than convinced that the defendant does not have any real defence to the plaintiff's claim. The plaintiff's case is unusually strong and I have no hesitation in finding even at this interlocutory stage that the plaintiff would succeed in getting the mandatory injunction should this case go to trial. I therefore find that in the circumstances of this case it is just and equitable that the plaintiff's interest be

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protected by the issue of the injunction prayed for. The plaintiff's prayers (apart from prayer 2) are therefore allowed with costs.

Application for mandatory injunction allowed with costs.

Reported by Kenny Wong

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